Sinar Wang Sdn Bhd v Ng Kee Seng

COURT OF APPEAL (KUALA LUMPUR) — CIVIL APPEAL NO W–02–701 OF 1998

GOPAL SRI RAM, ABDUL KADIR SULAIMAN AND ARIFIN ZAKARIA JJCA

26 SEPTEMBER 2001

Contract — Formation — Contract for sale of property — Proforma — 'Subject to contract' — Dispute arose between parties whether a certain term should form part of agreement — Whether contract concluded

Contract — Specific performance — Factors to be considered in exercising court's discretion — Particulars of equitable misconduct not pleaded — 'Subject to contract' — Dispute arose between the parties whether a certain term should form part of agreement — Whether there was a binding contract — Whether trial court should exercise its discretion against plaintiff

The defendant wanted to sell a piece of property and a purchaser was found. The proforma of sale dated 7 July 1992 was signed by both parties on 10 July 1992 and exchanged between the parties. It is not in dispute that the proforma did use the phrase 'subject to contract'. In the course of discussing the terms that were to be put into the agreement, a dispute arose when the plaintiff insisted on a term but the defendant disagreed. The defendant took the position that there was no contract; that the parties were still in negotiation and that it was not obligated to sell and transfer the subject property to the plaintiff. The trial judge who tried the action gave judgment for the plaintiff. He decreed specific performance and made the usual consequential order as to costs. It is against that decree of specific performance that the defendant has appealed. The trial judge confined himself to two issues: (i) whether there was a concluded and binding contract between the parties? (ii) whether it was a term of that contract that the plaintiff shall have conversion of the lower third and upper third floors of the subject property to commercial use? He answered the first issue in the affirmative and the second issue in the negative. The defendant also argued that even if there was a concluded contract at law, specific performance were not rightly decreed because the plaintiff who was to be blamed for the state of affairs that persisted immediately before the issue of the writ. If there had been no insistence on the term as to conversion, there would had been smooth sailing to completion. By giving the plaintiff specific performance, the trial judge had afforded him a second bite of the proverbial cherry, hardship on the defendant and that the plaintiff delay in instituting or prosecute his claim.

Held, dismissing the appeal:

(1) There are three broad categories into which the negotiations between parties to an agreement may fall (see para 14). The task that the court should undertake when it is confronted with the question whether there was a binding contract arrived at through correspondence was set out

in the following terms by the Federal Court in *Charles Grenier Sdn Bhd v Lau Wing Hong* [1996] 3 MLJ 327 (see para 15). It does not follow as night follows day that just because the words 'subject to contract' appear in a proforma, that there is no concluded contract (see para 16).

(2) If a defendant in a suit for specific relief wishes the trial court to exercise discretion against the plaintiff, he must plead and give particulars of the equitable misconduct complained of. It would be wrong for a trial judge to pronounce upon issues not placed before him in the pleadings either in their original form or by way of amendment (see para 25); *Haji Mohamed Dom v Sakiman* [1956] MLJ 45 and *Tan Ah Sam v Chartered Bank* [1997] 1 MLJ 28 followed.

(3) On the issue of hardship, this is a matter also not put on record before the trial judge. It is an academic point at this stage. All that the trial judge has decreed is specific performance in general terms of the contract he found to exist. No consequential orders were either asked for or made. The plaintiff has a way to go. He has to resort to the procedure set out in O 44 of the Rules of the High Court 1980. The issue of hardship and other issues that usually arise on a vendor and purchaser summons will no doubt be dealt with in the appropriate way at the appropriate stage (see para 30).

(4) A court of equity exercises its jurisdiction not in a straight-jacketed or inflexible fashion. The whole approach of equity to problems coming within its parameters is one of flexibility based on broad and general doctrines rather than strict and unyielding rules. This is the hallmark of equity and it is in this fundamental respect that equity differs and diverges from common law. Equitable remedies and doctrines are therefore flexible and adaptable to particular circumstances. The court of equity may therefore mould the relief that is to be granted on particular facts (see para 31). The formulation in the plaintiff's statement of claim for 'Any other relief which this Honourable Court deem fit to grant' must not be treated as a ornament to pleadings devoid of any meaning (see para 32).

[**Bahasa Malaysia summary**

Defendan berhasrat untuk menjual sebuah hartanah dan seorang pembeli dijumpai. Proforma jualan bertarikh 7 Julai 1992 ditandatangani oleh kedua pihak pada 10 Julai 1992 dan ditukarkan sesama kedua pihak. Adalah tidak dipertikaikan bahawa proforma tersebut sememangnya menggunakan frasa 'tertakluk kepada kontrak'. Semasa dalam perbincangan mengenai terma-terma yang akan dimasukkan di dalam perjanjian, satu pertelingkahan tercetus di antara pihak di mana plaintif mendesak satu terma tetapi defendan tidak bersetuju dengannya. Defendan mengambil keputusan tidak terdapat kontrak; bahawa pihak-pihak masih dalam perbincangan dan bahawa ia tidak berkewajipan

untuk menjual dan memindahkan hartanah tersebut kepada plaintif. Hakim bicara yang membicarakan tindakan ini memberi penghakiman memihak kepada plaintif. Beliau memerintahkan pelaksanaan spesifik dan membuat perintah berbangkit yang biasa mengenai kos. Defendan merayu terhadap perintah pelaksanaan spesifik. Hakim bicara membatasi dirinya kepada dua isu: (i) sama ada terdapat satu kontrak yang dicapai dan mengikat pihak-pihak? (ii) sama ada terdapat satu terma dalam kontrak yang plaintif akan mendapat penukaran tingkat tiga bahagian atas dan bawah hartanah tersebut kepada kegunaan komersial? Beliau menjawab 'ya' terhadap isu pertama dan 'tidak' kepada isu kedua. Defendan juga menghujahkan bahawa walaupun terdapat kontrak yang dicapai pada undang-undang, pelaksanaan spesifik tidak wajar diberikan kerana plaintif bertanggungjawab terhadap keadaan yang wujud sebelum writ dikeluarkan. Jika tidak terdapat desakan mengenai terma berhubung dengan penukaran, tentunya kontrak dapat disempurnakan secara lancar. Dengan memberikan pelaksanaan spesifik kepada plaintif, hakim bicara telah memberikan peluang kedua kepada plaintif, kesukaran kepada defendan dan bahawa plaintif lewat dalam memulakan tuntutannya.

Diputuskan, menolak rayuan tersebut:

(1) Terdapat tiga kategori dalam mana perundingan di antara pihak-pihak mungkin tergolong (lihat perenggan 14). Tugasan yang wajar diambil oleh mahkamah apabila ia menghadapi persoalan sama ada terdapat kontrak yang mengikat dicapai melalui surat menyurat dijelaskan di dalam kes Mahkamah Persekutuan *Charles Grenier Sdn Bhd v Lau Wing Hong* [1996] 3 MLJ 327 (lihat perenggan 15). Ianya tidak seperti malam diikuti siang bahawa hanya kerana terdapat perkataan-perkataan 'tertakluk kepada kontrak' di dalam proforma, maka tidak terdapat kontrak yang tercapai (lihat perenggan 16).

(2) Jika defendan di dalam sesuatu guaman untuk relif spesifik berhajat untuk mahkamah bicara menggunakan budi bicaranya menentang plaintif, beliau mestilah memohon dan memberikan butir-butir salah laku ekuiti yang diadu. Ianya salah bagi hakim bicara untuk memutuskan sesuatu isu yang tidak dibawa di hadapannya di dalam pliding dalam bentuk asal atau secara pindaan (lihat perenggan 25); *Haji Mohamed Dom v Sakiman* [1956] MLJ 45 and *Tan Ah Sam v Chartered Bank* [1997] 1 MLJ 28 diikuti.

(3) Mengenai isu kesukaran, ia juga merupakan sesuatu yang tidak direkodkan di hadapan hakim bicara. Ia merupakan satu persoalan akademik pada tahap ini. Apa yang telah didekrikan oleh hakim bicara ialah pelaksanaan spesifik pada terma-terma am kontrak yang beliau dapati ujud. Tiada perintah berbangkit dipohon atau diberikan. Plaintif mempunyai jalan untuk pergi. Beliau hendaklah menggunakan prosedur di bawah A 44 Kaedah-Kaedah Mahkamah Tinggi 1980. Isu kesukaran dan isu-isu lain yang biasanya timbul pada pihak penjual dan saman pembeli akan diuruskan dengan sewajarnya pada tahap yang sesuai (lihat perenggan 30).

(4) Mahkamah ekuiti tidak menggunakan bidang kuasanya secara terlalu tidak fleksibel. Pendekatan ekuiti kepada sesuatu masalah yang datang ke dalam bidang kuasanya ialah kegunaan kefleksibelan berdasarkan doktrin am dan umum dan bukannya kaedah-kaedah yang ketat dan tidak boleh dilenturkan. Ini merupakan ciri ekuiti yang berlainan dan berbeza dari 'common law'. Remedi dan doktrin ekuiti adalah fleksibel dan boleh disesuaikan kepada keadaan-keadaan tertentu. Mahkamah ekuiti oleh yang demikian boleh menyesuaikan relif yang akan diberikan berdasarkan fakta-fakta tertentu (lihat perenggan 31). Pengungkapan di dalam pernyataan tuntutan plaintif untuk 'Sebarang relif lain yang mana Mahkamah Yang Mulia ini fikirkan wajar untuk diberikan' tidak harus dianggap sebagai hiasan kepada pliding yang tidak mempunyai sebarang maksud (lihat perenggan 32).]

Notes

For cases on contract for sale of property, see 3(1) *Mallal's Digest* (4th Ed, 2003 Reissue) paras 3213–3216.

For cases on factors to be considered in exercising court's discretion, see 3(2) *Mallal's Digest* (4th Ed, 2000 Reissue) paras 4491.

For cases on specific performance generally, see 3(2) *Mallal's Digest* (4th Ed, 2000 Reissue) paras 3810–3862.

For decree of specific performance regarding contracts for sale of land, see 23 *Halsbury's Laws of Malaysia* (2004) paras [390.670]–[390.676].

Cases referred to

Charles Grenier Sdn Bhd v Lau Wing Hong [1996] 3 MLJ 327 (folld)
Dusik v Newton [1985] 62 BCLR 1 (folld)
Gluckstein v Barnes (1900) AC 240 (folld)
Haji Mohamed Dom v Sakiman [1956] MLJ 45 (folld)
Lim Eng Kay v Jaafar bin Mohamed Said [1982] 2 MLJ 156 (refd)
Lim Keng Siong & Anor v Yeoh Ah Tee [1983] 2 MLJ 39 (folld)
Masters v Cameron [1954] 91 CLR 353 (refd)
Tan Ah Sam v Chartered Bank [1997] 1 MLJ 28 (refd)
Von Hatzfeldt-Wildenburg v Alexander (1912) 1 CH 284 (refd)

Legislation referred to

Rules of the High Court 1980 O 44

Eugene Tan (Eugene Tan & Co) for the appellant.
S Selvarajah (Fernandez & Selvarajah) for the respondent.

Appeal from: Suit No S1–22–743 of 1993 (High Court, Kuala Lumpur)

Gopal Sri Ram JCA (delivering judgment of the court):

[1] This is the judgment of the court.

[2] The defendant is and was at all material times the registered proprietor of a piece of property off Jalan Ipoh. It is a four and a half storey shop house. The ground, first and second floors were used for commercial purposes. They were designated as such at the time the building was constructed. For convenience we will call it 'the subject property'.

[3] The defendant wanted to sell the subject property. It engaged the services of Rahim & Co, a well-known and reputable firm of estate agents. Eventually, the estate agents introduced the plaintiff as the intending purchaser. At about the same time, Rahim & Co prepared a letter setting out the terms on which the sale and purchase was to be carried out. The conveyancing Bar calls such a document 'the proforma of sale'. The proforma in this case was dated 7 July 1992. In accordance with the usual conveyancing practice, a copy of the proforma was sent to the plaintiff and defendant respectively. The defendant signed its copy of the proforma on the 10 July 1992. What that meant was that the defendant accepted the offer made to it to buy the property. It is in evidence that the plaintiff also signed his copy of the proforma on the same date. It is not in dispute that the proforma does use the phrase 'subject to contract'. In fact, those words appear at the very top of the proforma. Since almost the whole of the argument before the High Court centered on the proforma, it is best, we think, that each be reproduced.

[4] Shorn of its formalities, this is how the proforma addressed to the plaintiff reads:

Dear Mr Ng

We are pleased to inform you that our client, Ms Sinar Wang Sdn Bhd has agreed to sell the above property to you subject to the terms and conditions as set out below:

(1) Sale Price	M$750,000.00 (Ringgit: Seven Hundred And Fifty Thousand Only)
(2) Terms of Payment	(a) The sum of M$75,000 (Ringgit: Seventy Five Thousand Only) representing ten percent (10%) of the Sale Price shall be paid upon execution of the Sale and Purchase Agreement. Any earnest monies paid shall be included in this sum. This amount is forfeitable in the event the Purchaser shall fail to complete the transaction within the time provided.

	(b) The sum of M$675,000 (Ringgit: Six Hundred and Seventy Five Thousand only) representing the balance of the Sale Price shall be paid within three (3) months from the date of execution of the Sale and Purchase Agreement.
	(c) An extension period of one (1) month shall be provided subject to the balance incurring an interest at the rate of 12% per annum-calculated on a daily basis.
(3) Earnest Money	M$7,500 (Ringgit: Seven Thousand Five Hundred only) shall be paid upon acceptance of the terms and conditions as stated in this letter. This amount is forfeitable in the event the transaction is aborted by the Prospective Purchaser prior to the execution of the Sale and Purchase Agreement.
(4) Possession of Property	Upon receipt of the full payment of the sale price.
(5) Quit Rent & Assessment	This shall be apportioned at the time of delivery of possession.
(6) Transfer & Stamp fees	The purchaser shall bear the cost of transfer and stamp fees including preparation of the Sale and Purchase Agreement. However, each party shall bear their own legal fees.
(7) Specific Terms & Conditions	(a) This sale is made subject to the existing tenancy and all rights of the tenant thereunder being undertaken by the purchaser.
	(b) In the event there is no Novation Agreement signed between the Vendor, the Purchaser and the tenant then the Purchaser shall only be entitled to terminate the tenancy agreement through the Vendor and to pay compensation to the tenant accordingly with the tenancy agreement executed between the Vendor and the Tenant.
	(c) The Purchaser shall indemnify the Vendor of any losses, claims made by the tenant in the event of any premature termination of the tenancy agreement made by the Purchaser.

(8) Other Terms & Conditions	(a) The Vendor shall undertake to refund to the purchaser on demand all the deposit sums of monies paid by the purchaser free of interest in the event the Memorandum of Transfer cannot be registered for any reason whatsoever by the Purchaser.
	b) The Sale and Purchase Agreement shall be executed within twenty one (21) days from the date of the Vendors acceptance.

Please note that this offer is made subject to final acceptance by the Vendor.

Should the above terms and conditions be satisfactory, kindly sign and return the duplicate copy of this letter to us soonest.

[5] The defendant's copy of the proforma again, shorn of its formalities, reads as follows:

We are pleased to inform you that our prospective purchaser, Mr Ng Kee Seng has agreed to purchase the above property from you subject to the terms and conditions as set out below:

(1) Sale Price	M$750,000 (Ringgit: Seven Hundred And Fifty Thousand Only)
(2) Terms of payment	(a) The sum of M$75,000 (Ringgit: Seventy Five Thousand Only), representing ten percent (10%) of the Sale Price shall be paid upon execution of the Sale and Purchase Agreement. Any earnest monies paid shall be included in this sum. This amount is forfeitable in the event the Purchaser shall fail to complete the transaction within the time provided.
	(b) The sum of M$675,000 (Ringgit: Six Hundred and Seventy Five Thousand only) representing the balance of the Sale Price shall be paid within three (3) months from the date of execution of the Sale and Purchase Agreement.
	(c) An extension period of one (1) month shall be provided subject to the balance incurring an interest at the rate of 12% per annum calculated on a daily basis

(3) Earnest Money	M$7,500 (Ringgit: Seven Thousand Five Hundred only) shall be paid upon acceptance of the terms and conditions as stated in this letter. This amount is forfeitable in the event the transaction is aborted by the Prospective Purchaser prior to the execution of the Sale and Purchase Agreement.
(4) Possession of Property	Upon receipt of the full payment of the sale price.
(5) Quit Rent & Assessment	This shall be apportioned at the time of delivery of possession.
(6) Transfer & Stamp Fees	The purchaser shall bear the cost of transfer and stamp fees including preparation of the Sale and Purchase Agreement. However, each party shall bear their own legal fees.
(7) Specific Terms & Conditions	(a) This sale is made subject to the existing tenancy and all rights of the tenant thereunder being undertaken by the purchaser
	(b) In the event there is no Novation Agreement signed between the Vendor, the Purchaser and the tenant then, the Purchaser shall only be entitled to terminate the tenancy agreement through the Vendor and to pay compensation to the tenant accordingly with the tenancy agreement executed between the Vendor and the Tenant.
	(c) The Purchaser shall indemnify the Vendor of any losses, claims made by the tenant in the event of any premature termination of the tenancy agreement made by the Purchaser.
(8) Other Terms & Conditions	(a) The Vendor shall undertake to refund to the purchaser on demand all the deposit sums of monies paid by the purchaser free of interest in the event the Memorandum of Transfer cannot be registered for any reason whatsoever by the Purchaser.
	(b) The Sale and Purchase Agreement shall be executed within twenty one (21) days from the date of the Vendors acceptance

Should the above terms and conditions be satisfactory, kindly sign and return the duplicate copy of this letter together with the following documents to us soonest.

(i) A photocopy of the latest Assessment & Quit Rent receipt.

(ii) A photocopy of the existing Tenancy Agreement.

(iii) A photocopy of the conversion premium receipt for converting residential to commercial status for the upper floors.

(iv) A certified copy of the Company Resolution.

[6] After the exchange of the proforma, the parties got down to the business of settling a formal sale and purchase agreement. In the course of discussing the terms that were to be put into the agreement, a problem arose. It had to do with the conversion of the lower third and upper third floors of the subject property from residential use to commercial use. The plaintiff insisted on the term. But the defendant would have none of it. So a dispute arose. The defendant took the position that there was no contract, that the parties were still in negotiations and that it was not under an obligation to sell and transfer the subject property to the plaintiff.

[7] In September 1993 the plaintiff sent his letter before action. The plaintiff requested for an opportunity to re-negotiate the terms of the proposed formal agreement. However, it must be borne in mind that the defendant had already declared its unwillingness to complete in its letter dated 31 October 1992. Despite this, the writ was issued only on 13 December 1993.

[8] After the usual exchange of pleadings, the trial of the action commenced on 22 April 1998. Decision was handed down on 18 September 1998. The learned judge who tried the action gave judgment for the plaintiff. He decreed specific performance and made the usual consequential order as to costs. It is against that decree of specific performance that the defendant has appealed.

[9] When he came to give his written reasons for his decision, the learned trial judge confined himself to two issues. These were:

(i) Whether there was a concluded and binding contract between the parties?

(ii) Whether it was a term of that contract that the plaintiff shall have conversion of the lower third and upper third floors of the subject property to commercial use?

[10] He answered the first issue in the affirmative and the second issue in the negative. In dealing with the first issue, the learned judge examined the proforma signed by the defendant and the other relevant correspondence before coming to his conclusion that there was a binding contract.

[11] Before us, Mr Eugene Tan, of counsel for the defendant has sought to argue that the learned judge was wrong for several reasons. We trust that we do counsel no injustice if we summarize his arguments under three broad heads, first, that the learned judge was wrong in concluding that there was a contract because:

(i) the proforma was made subject to contract and

(ii) the parties were still negotiating and therefore were not in consensus ad idem.

[12] Second, the whole of the dispute arose because of the plaintiff's insistence upon the term as to conversion. Thirdly, there are several features in this case overlooked by the learned judge that disentitled the plaintiff to the extraordinary remedy of specific performance. We will take each of these in turn.

WAS THERE A CONCLUDED CONTRACT?

[13] The defendant argued that there was no concluded contract. Indeed its entire pleaded case was aimed in that direction. The plaintiff said there was a concluded contract. The learned judge, as we have already said agreed with the plaintiff. We think that the learned judge was correct.

[14] Now, there are three broad categories into which the negotiations between parties to an agreement may fall. These were neatly summarized by Dixon CJ, McTiernan and Kitto JJ in *Masters v Cameron* [1954] 91 CLR 353:

> Where parties who have been in negotiation reach agreement upon terms of a contractual nature and also agree that the matter of their negotiation shall be dealt with by a formal contract, the case may belong to any of three classes. It may be one in which the parties have reached finality in arranging all the terms of their bargain and intend to be immediately bound to the performance of those terms, but at the same time propose to have the terms restated in a form which will be fuller or more precise but not different in effect. Or, secondly, it may be a case in which the parties have completely agreed upon all terms of their bargain and intend no departure from or addition to that which their agreed terms express or imply, but nevertheless have made performance of one or more of the terms conditional upon the execution of a formal document. Or thirdly, the case may be one in which the intention of the parties is not to make a concluded bargain at all, unless and until they execute a formal contract.
>
> In each of the first two cases, there is a binding contract: in the first case a contract binding the parties at once to perform the agreed terms whether the contemplated formal document comes into existence or not, and to join (if they have so agreed) in settling and executing the formal document; and in the second case a contract binding the parties to join in bringing the formal contract into existence and then carry it into execution.

[15] The task that the court should undertake when it is confronted with the question whether there was a binding contract arrived at through correspondence was set out in the following terms by the Federal Court in *Charles Grenier Sdn Bhd v Lau Wing Hong* [1996] 3 MLJ 327 at p 2:

> An agreement to make an agreement does not result in a contract. It is for the court in each case to construe the correspondence exchanged between the parties and to say whether that is the result intended by the parties. If the court reaches an opposite conclusion, then there is an enforceable contract.

[16] It does not follow as night follows day that just because the words 'subject to contract' appear in a proforma, that there is no concluded contract. This proposition is well illustrated by the decision of the former Federal Court in *Lim Keng Siong & Anor v Yeoh Ah Tee* [1983] 2 MLJ 39. That was a much stronger case than the present. The proforma there read as follows:

> I confirm, subject to contract, that the lowest price I am willing to sell the said property is $5.40 per square foot in Singapore currency, the sale and purchase to be completed latest by 24 March 1976. Ten per cent deposit to be paid within the course of the next few days if your buyer Mr Yeo Ah Tee agrees to the price and the terms.

[17] Following further negotiations, the estate agent in that case wrote the following letter:

> We refer to our telephone conversation this afternoon in which you have kindly accepted our Client's (Mr Yeo Ah Tee) further offer regarding the above, with vacant possession at a price of RM5.20 per square foot for RM454,391.60 (Ringgit, Four Hundred and Fifty Four Thousand Three Hundred and Ninety One dollars and Cents Sixty Only). The sale is to include all buildings, plant and machinery and all ancillary facilities etc. We have received further instructions to inform you that our client has appointed Messrs Ting Poi Tak & Co of 30 Jalan Laksamana as his solicitors to deal with all legal matters pertaining to the above sale. Messrs Ting Poi Tak & Co will communicate direct with you regarding the sale.

[18] Wan Yahya J (as he then was) held that there was a concluded contract notwithstanding the use of the phrase 'subject to contract'. His decision was affirmed by a strong Federal Court (Salleh Abbas CJ (Malaya), Abdul Hamid and Seah FCJJ). There are two short passages in the judgment of Abdul Hamid FCJ which merit reproduction. Both appear at p 48 of the report.

[19] The first passage reads as follows:

> The incontrovertible facts which gave rise to the findings made by the learned judge show very clearly that all the terms and conditions of *necessary to conclude a contract* had been agreed upon by the parties of 3 March 1976. There was no stipulation that the contract was not to be binding until execution of a formal contract, indeed to make the formal execution of the contract an essential condition for its conclusion. (Emphasis added)

[20] The second passage deals with the use of the phrase 'subject to contract' in the correspondence in that case. It reads as follows:

> The letter of 1 March 1976 may well have been a starting point leading to the further events that followed. Too much cannot, we think, be read into the letter other than an expression by the appellants to sell the said land at the price quoted subject of course to a contract to be concluded. It makes sense because no negotiations had yet taken place. It was otherwise after Mr Chan (PW2) had, pursuant to a negotiation with the appellants on 3 March 1976 secured the agreement of the appellants to sell the said land on terms orally agreed between them.

[21] In upholding Wan Yahya J's judgment, the Federal Court relied on a passage from the judgment of Parker J in *Von Hatzfeldt-Wildenburg v Alexander* (1912) 1 CH 284, at p 288:

> It appears to be well settled by the authorities that if the document or letters relied as constituting a contract contemplates the execution of a further contract between the parties it is a question of construction whether the execution of the further contract is a *condition* or *term* of the bargain or whether it is mere expression of the desire of the parties as to the manner in which the transaction already agreed to will in fact go through. In the former case, there is no enforceable contract because the condition is unfulfilled or because the law does not recognize a contract to enter into a contract. In the latter case, there is a binding contract and reference to the more formal document may be ignored.

[22] The learned judge in the present instance referred to and applied the tests set out in *Lim Keng Siong & Anor v Yeoh Ah Tee* (supra) and *Charles Grenier* (supra). He was not only entitled but obliged to do so because these are decisions which were plainly binding on him. It is only after carefully scrutinizing the correspondence and attendant circumstances that the learned judge arrived at his findings. We are therefore unable to detect any appealable error either in his reasoning, his approach or in his conclusion. We would therefore with respect, reject the argument of learned counsel for the appellant that the learned judge had fallen into error.

WAS SPECIFIC PERFORMANCE RIGHTLY DECREED?

[23] Mr Eugene Tan formulated a most attractive argument in clear and precise terms to support his client's case, that even if there was a concluded contract at law, the learned judge ought to have exercised discretion and declined to decree specific performance because of the particular facts before him. In particular, Mr Eugene Tan has drawn the following matters to our attention, which he says were overlooked by the learned judge:

(i) It is the plaintiff who was to be blamed for the state of affairs that persisted immediately before the issue of the writ. If there had been no insistence on the term as to conversion, there would had been smooth sailing to completion. By giving the plaintiff specific performance, the trial judge had afforded him a second bite of the proverbial cherry.

(ii) The plaintiff lay in slumber for a considerable time even after the defendant had said there was no contract.

(iii) That the decree of specific performance imposes hardship upon the defendant.

(iv) There was no alternative prayer in the plaintiff's statement of claim for a varied decree of specific performance. The plaintiff had sought specific performance of a contract that included a term as to conversion. Without

an amendment to his pleading, he had obtained specific performance of a different contract, namely, one that did not have the aforesaid term.

[24] We find it convenient to take the first two matters together. In a gist, they relate to what has now come to be commonly called equitable misconduct. This compendious phrase encompasses the various discretionary considerations that touch upon the conduct of a party seeking relief. It also, for certain limited purposes, includes any delay by a claimant for specific relief to either institute or prosecute his claim.

[25] If a defendant in a suit for specific relief wishes the trial court to exercise discretion against the plaintiff, he must plead and give particulars of the equitable misconduct complained of. It would be wrong for a trial judge to pronounce upon issues not placed before him in the pleadings either in their original form or by way of amendment . The point is well settled by numerous authorities and we find reference to two of these to be sufficient.

[26] In *Haji Mohamed Dom v Sakiman* [1956] MLJ 45 the plaintiff claimed specific performance of an agreement for the sale of a piece of land. The agreement included a provision for the payment of penalty in the event of non-transfer. The defendant pleaded forgery. The learned trial judge held the document to be genuine. However, he went on to hold that the agreement was not a true contract for the sale of land but was a money lending transaction. He therefore dismissed the plaintiff's claim. The plaintiff appealed. The Court of Appeal reversed. It was held that since there was no allegation of money lending in the pleadings, the judge had gone wrong in dealing with that issue.

[27] Mathew CJ at p 45 said:

> Nowhere in the pleadings is it alleged that the agreement was in the nature of a document of loan and the case never proceeded on that basis. In my view, once he had found that the agreement for sale was a genuine document, the learned trial judge had no alternative but to order specific performance of the agreement or to award damages. I think it is clear that a judge is bound to decide a case on the issues on the record and that if there are other questions they must placed on the record, which in this case they were not, *Blay v Pollard & Morris* (1930) 1 KB 628.

[28] Again in *Tan Ah Sam v Chartered Bank* [1997] 1 MLJ 28 at p 31, Suffian FCJ said:

> Mr Abraham for the plaintiff before us complains that the bank was negligent in delaying to inform the plaintiff of what it had done. There was evidence that the letter received by the plaintiff on the 15th had been typed on the ninth, which implies that even as early as the ninth the bank had decided to return the plaintiff's cheque and yet they did not post it until the 13th, and it is said, that if the battle had not been negligent and had posted the letter on the ninth, the day it was typed, it would have reached the plaintiff on the 11th (a Monday) and he would have made other arrangements to put his account in funds in time to meet the cheques he had issued. *I think that this argument raises a new issue and we should not consider it.*

The pleadings do not mention negligence, there was naturally no evidence led by the bank to rebut it and there was no mention of it in Mr Kok's address in the lower court. (Emphasis added)

[29] Applying these pronouncements made by distinguished judges to the facts of the present case, we are of the opinion that the learned judge was quite right in not considering the issues that were argued before us when this appeal came up on Monday (23 September 2002) of this week. None of the complaints constituting equitable conduct were ever raised in the defendant's pleadings. As we have already said the defendant targeted only one issue: there was no concluded contract. That was the only issue put before the judge. Neither laches nor delay nor any other form of misconduct falling within the 'clean hands' doctrine were ever placed on record. They were therefore not issues raised before the learned judge. He therefore cannot be blamed for failing to deal with them.

HARDSHIP

[30] Turning to the third point; issue of hardship, this is a matter also not put on record before the learned judge. It is an academic point at this stage. All that the learned judge has decreed is specific performance in general terms of the contract he found to exist. No consequential orders were either asked for or made. The plaintiff has a way to go. He has to resort to the procedure set out in O 44 of the Rules of the High Court 1980. The issue of hardship and other issues that usually arise on a vendor and purchaser summons will no doubt be dealt with in the appropriate way at the appropriate stage. Any comment we make now will be entirely gratuitous and may only produce a prejudicial effect one way or the other. We therefore, choose the line of least resistance and will say nothing about it.

[31] We now address the fourth point. Mr Tan's argument that the learned judge gave the plaintiff something he had not asked for overlooks two fundamental principles. A court of equity exercises its jurisdiction not in a straight jacketed or inflexible fashion. The whole approach of equity to problems coming within its parameters is one of flexibility based on broad and general doctrines rather than strict and unyielding rules. This is the hallmark of equity and it is in this fundamental respect that equity differs and diverges from common law. Equitable remedies and doctrines are therefore flexible and adaptable to particular circumstances. The court of equity may therefore mould the relief that is to be granted on particular facts. So, for example if rescission appears to be the inevitable or indeed the only remedy in a given case, a court of equity may decline to order rescission and instead may order equitable compensation by way of adjustment. The cases of *Gluckstein v Barnes* (1900) AC 240 and *Dusik v Newton* [1985] 62 BCLR 1 amply illustrate the malleability of equitable remedies to fit particular circumstances. We therefore find no merit in Mr Tan's argument.

[32] There is another reason why we would reject the submission of counsel. In his statement of claim the plaintiff also sought a prayer for 'other relief that this Honourable Court deems fit and just'. Now these are not empty words. As Salleh Abbas FCJ observed in another context in *Lim Eng Kay v Jaafar bin Mohamed Said* [1982] 2 MLJ 156:

> In any case, prayer (e) in paragraph (7), 'Any other relief which this Honourable Court deem fit to grant' must not be treated as a ornament to pleadings devoid of any meaning.

[33] In our judgment the formulation in the plaintiff's statement of claim quoted above is sufficient for the exercise of equitable jurisdiction to mould the decree of specific performance to fit the facts as found by the learned judge.

THE UPSHOT

[34] We have considered the plaintiff's complaints very carefully. We have scrutinized the learned judge's judgment: and tested it against the material available in the record provided to us. Having done so, we are entirely satisfied that there is no ground on which the learned judge may be justifiably criticised. Indeed the case for the plaintiff at this stage was so clear that we found no necessity to trouble his counsel for a response to the defendant's argument. This appeal accordingly fails. It is dismissed.

Appeal dismissed.

Reported by Sally Kee